IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 21ST MARCH 2007 / 30TH PHALGUNA 1928

CRL.A.No. 871 of 1999()

CC.9/1995 of ENQUIRY COMMR. & SPL. JUDGE, THRISSUR

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APPELLANT/APPELLANT:

T.A.JOLLY,
S/O.AUGUSTINE,
THYKOOTATHIL HOUSE,
KOTHAD.

BY ADV. SRI.K.K.JAYARAJ NAMBIAR

RESPONDENT/RESPONDENT:

STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ALONG WITH CRL.A.NOS.899 & 917 OF 1999 ON 21/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY, J.

Crl.Appeal Nos.871, 899 &
917 OF 1999

Dated 21st March, 2007

JUDGMENT

Accused three in number (A1 – former President of Kadamakkudy Panchayat, A2 - former Executive Officer of Kadamakkudy Panchayat and A3 - a contractor in the above Panchayat) were charge sheeted for offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and under Sections 406, 409 and 120B of the Indian Penal Code. A1 and A2 were found guilty under Section 13(2) read with Section 13(1)(d) of the P.C. Act and under Sections 409 and 120B of the I.P.C. A3 was found guilty for offence punishable under sections 406 and 120B of the Indian Penal Code. To sum up the allegations against the accused, we quote the charge sheet itself:

> "2. That the first accused among you, T.A.Jolly was the President and second accused K.Muthukrishnan was the Executive Officer of Kadamakkudy Panchayat during the period from May 1988 to March 1989, and as such public servants, have committed criminal misconduct by abusing your official position and criminally conspired with third accused E.L.Jame3s, the contractor for the execution of the public works during 1988-89 in Kadamakkudy Panchayat namely (1) Maintenance and improvement of Chenoor

L.L.H.S. Colony Road in Ward No.VI and (2) Filling the low portion of the L.L.H.S. Colony Road, Chenoor in Ward No.VI and obtained undue pecuniary advantage to the tune of Rs.6,031.19 to the third accused and wrongful loss to that extent to Kadamakkudy Panchayat and thereby also committed criminal breach of trust.

3. Thereby you accused Nos.1 and 2 committed offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act 1988 and under Sections 409 and 120B of the Indian Penal Code, and you the third accused has committed offences punishable under Sections 406 and 120B of the Indian Penal Code within the cognizance of this court."

2. At the outset, it was pointed out that to attract Section 406 and 409 of the I.P.C., accused must have committed offence of breach of trust. In other words, it is the duty of the prosecution to establish that ingredients of Section 405 IPC are satisfied. Section 405 of the Indian Penal Code reads as follows:

"S.405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

It is well settled law that offence under section 405 IPC can be said to have been committed only when all the ingredients of that offence as defined in the statute are found to have been satisfied. Doctrine of public trust cannot be invoked in fixing the criminal liability and the whole matter is to be decided on the principles of criminal liability as held by the Apex Court in **Common Cause, A Registered Society** v. **Union of India** (AIR 1999 SC 2979). In order to prove the charge of criminal breach of trust by a public servant, there have to be an entrustment, thereafter misappropriation in violation of the trust. It was held by the Supreme Court in **State of Gujarat** v. **Jaswantlal** (AIR 1968 SC 700) where the Government sells cement to a contractor solely for the purpose of its being used for the construction work, there is no entrustment. The most crucial expression is "entrustment" upon which fulcrum is pivotted the entire scheme of the relevant provisions of law relating to criminal breach of trust. In the charge there is no allegation of entrustment of property. No evidence was adduced with regard to the same. The finding is also that there is dishonest misappropriation. Even though an issue was framed, there is no finding on entrustment.

3. It was also argued that even though first and second accused were charge sheeted under the Prevention of Corruption Act, it was not investigated properly by the officer as authorised under Section 17 of the P.C. Act. Offences under the P.C. Act are to be investigated only by officers not below the rank of Deputy Superintendent of Police or by officers duly authorised by the State Government by notification. PW10, C.I. Of Police, S.B.C.I.D. Ernakulam City conducted investigation. He stated in chief examination that he conducted the investigation in this case, but, in cross examination he stated that he did not go to the place or inspected the place and he did not even prepare the mahazar. He deposed as follows:

When the allegation was that the contract work undertaken by the third accused was not carried out properly and Panchayat money was misappropriated in connivance of A1 and A2, the investigating officer should have inspected the place for finding out whether the allegations are correct.

PW11 Deputy Superintendent of Police, Vigilance Department, Ernakulam has admitted that the enquiry was conducted by PW10. He deposed as follows:

Therefore, there is illegality in the investigation itself. It is the case of the accused that due to political rivalry a complaint was forwarded by PW6 and it was then forwarded to the Vigilance Department, but, Vigilance Department did not take any action. When first accused approached this court in O.P.No.3649/1989, this court directed the Superintendent of Police, Vigilance Department to conduct a fair and impartial investigation in the matter, but, it was not so done. The charge is relating to the work done during 1988-89. The investigation itself was started much belatedly. Before going into these technical points, we may consider whether there is evidence to convict the accused and whether allegations against the accused were proved.

4. PW1 examined in this case was the Taluk Panchayat Officer, Kanayannore. He proved the documents tender register, contract, pass books and various reports

received by him etc. which would show that the third accused was the contractor and the amounts were paid after reporting that the work was done. The main evidence relied on by the prosecution in this case is the evidence of PWs2 and 8. We will consider the evidence of other witnesses before we come to the evidence of PWs 2 and 8.

4. PW3 was a clerk of the Panchayat. He identified signature in various documents. It is stated that he pointed out the place in question to PW2. PW4 was a Panchayat Member from Ward No.I. He was also a member of the sub-committee formed as per resolution No.88 dated 30.3.1989 to enquire into the allegations of the works done at the Panchayat. Ext.P25 is the copy of the resolution. The allegations in this case relates to Ward No.VI. PW4 also stated that work will be supervised by the ward members of the particular ward. He denied the suggestion that the committee inspected the site was not mentioned in the minutes dated 20.4.1989. He further stated that in the meeting of the sub-committee held on 20th July, 1989 it was decided not to continue the enquiry. Therefore, his case will not support the prosecution case. PW5 was a person residing adjacent to the LLHS colony. He was also a resident of the ward. PW6 filed Ext.P28

complaint and PW7 sent Ext.P29 complaint. According to them only part work was done. They were not residents of the concerned ward.

5. Now, we will come to the evidence of PW2. It is PW2 who conducted the real investigation and not by the police. He deposed that during the period from 1982 to 1990 he was the Oversear of the nearby Panchayat and he inspected the work in Kadamakkudy Panchayat during 1988-89. He filed Ext.P23 report. He stated that after the inspection it was found that the work done was not as per the specification. With regard to the maintenance and improvements of Chenoor LLHS Colony Road in Ward No.VI, according to his report earth work was done only for Rs.20.17 instead of Rs.69.50. With respect to the dry stone work, it was found that instead of the work for Rs.3,854.48 only work to the tune of Rs.732.35 alone was done (only work of 5.32 M^3 instead of 27.60 M^3), for the soil spreading instead of the work for Rs.794.33 only work of Rs.313/- was done. Thus, according to PW2, for the work in item No.1 mentioned above, loss to the Panchayat was Rs.3,774.19. With regard to item No.2, loss to the Panchayat was Rs.2,257.37 and the total loss caused was Rs.6,031.19 as mentioned in the charge sheet. But, in

cross examination he stated that he cannot say how maintenance work was done. He also stated that he has not measured the road fully and has not prepared any mahazar. He deposed as follows:

He also stated that part of the Kadamakkudy Panchayat is water logged. During flood time, removal of the stone and soil from the road cannot be ruled out. At the time when he inspected the site, it was monsoon season. He also stated that at the time of his inspection he did not intimate the ward members or executive officers. This is the only evidence adduced by the prosecution to show that work was not done.

6. PW8 is the ward member concerned. She deposed that the work was carried out in her ward. She stated that estimated work as per the contract was completed and she issued a certificate. She further deposed as follows:

Thus Ext.P3(c) would show that the concerned ward member of Ward No.VI gave the completion certificate after verification. Even though when she was asked about specification, she stated that she is unable to understand the same, she clearly stated that what is the work to be done in her ward is known to her and she was fully satisfied with the work as per the order was given then only the certificate was issued by her. She also stated that she was satisfied about the work and none of the members in the area complained regarding the work. She deposed as follows:

She again stated that after the work it was found that the work was done and then only the certificate was issued. Even though she stated that she cannot say what is the measurement book, she stated that after the work is over it is entered in a book. But, only on satisfaction the certificate was issued. She stated as follows:

She was not declared hostile. Therefore, her evidence is binding on the prosecution. Here, prosecution's own evidence shows that work as per the contract was done. PW2 who came to inspect the property without notice to ward members or executive officers made some reports during the monsoon time and on that sole basis it cannot be stated that it is not established that he measured the property. He has not prepared even mahazar. He himself has stated that he has not measured the entire road in question. On that basis it cannot be stated that work as per the specification in the contract was not done especially when PW8 ward member certified that she gave a completion certificate after she was satisfied and members of that ward have not made any complaint to her. In these

circumstances, we are of the view that the allegations levelled against the accused were not proved. In view of the above finding, I am not going into the technical contentions raised by the appellants. The conviction and sentence against the accused are set aside and the appellants are acquitted.

All the appeals are allowed.

J.B.KOSHY
Judge

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